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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIP DUARTE DIAZ, JR.,

Defendant and Appellant.

F042157

(Super. Ct. No. 70924A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Robert V. Vallandigham, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, and Harry Joseph Colombo, Deputy Attorney General, for Plaintiff and Respondent.

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A jury convicted appellant, Phillip Duarte Diaz, Jr., of two counts of assault with a deadly weapon (counts 1 & 2/Pen Code, § 245, subd. (d)(1)),¹ three counts each of

* Before Vartabedian, Acting P.J., Buckley, J., and Cornell, J.

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

attempted murder (counts 1, 12, & 13/Pen. Code, §§ 664/187) and obstruction of a peace officer (counts 6, 7, & 9, § 69), and one count each of assault with a firearm (count 2-§ 245, subd. (a)(2)), possession of methamphetamine (count 5-Health & Saf. Code, § 11377), and misdemeanor vandalism (count 11-§ 594, subd. (b)(4)). The jury also found true allegations in counts 1 through 4, 12, and 13 that Diaz personally used a firearm (§ 12022/5, subd. (a)). This case has previously been remanded for resentencing twice. Diaz's last resentencing occurred on November 5, 2002, when the court sentenced him to the following indeterminate terms: life with the possibility of parole on counts 1, 12, and 13, plus a total of 18 years for the enhancements in those counts. The court also sentenced Diaz to an aggregate determinate sentence of five years as follows: a three-year term on count 5, a consecutive eight-month term on count 6, a stayed four-year term on the arming enhancement in that count, consecutive eight-month terms on each of counts 7 and 8, a stayed term on count 2, and a stayed term on the arming enhancement in that count.

On appeal, Diaz contends the court erred when it imposed a stayed enhancement term on count 6. Respondent concedes and we agree.

Diaz committed his offenses in 1997. At that time section 1170.1 provided, in pertinent part, as follows:

“Except as provided in subdivision (c) and subject to Section 654, when any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed pursuant to Section 667, 667.5, 667.6, or 12022.1, and pursuant to Section 11370.2 of the Health and Safety Code. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any enhancements imposed pursuant to . . . 12022.5 . . . of this code, . . . *The subordinate term for each consecutive offense which is not a ‘violent felony’ as defined in subdivision (c) of*

Section 667.5 shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for an offense that is not a violent felony for which a consecutive term of imprisonment is imposed, and shall exclude any enhancements. In no case shall the total of subordinate terms for these consecutive offenses which are not ‘violent felonies’ as defined in subdivision (c) of Section 667.5 exceed five years. The subordinate term for each consecutive offense which is a ‘violent felony’ as defined in subdivision (c) of Section 667.5, including those offenses described in paragraph (8), (9), or (17) of subdivision (c) of Section 667.5, shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for an offense that is a violent felony for which a consecutive term of imprisonment is imposed, and shall include one-third of any enhancements imposed pursuant to . . . 12022.5”

Obstructing a peace officer in violation of section 69 is not one of the violent felonies listed under section 667.5, subdivision (c). Accordingly, we find the court erred when it imposed a stayed enhancement term of four years on the arming enhancement in count 6.

DISPOSITION

The judgment is modified to strike the stayed four-year enhancement term imposed on Diaz’s conviction in count 6 for obstructing a peace officer. The trial court is directed to prepare an amended abstract of judgment consistent with this opinion and to forward a certified copy to the Department of Corrections. As modified, the judgment is affirmed.